No. 82-2072

In the Supreme Court of the United States

OCTOBER TERM, 1983

IN RE: ALGER HISS, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government's failure to disclose inconclusive evidence casting doubt on the authenticity of an exhibit located, vouched for, and introduced into evidence by petitioner deprived petitioner of a fair trial.

2. Whether the government's receipt of information from a defense investigator abridged petitioner's Sixth Amendment right to counsel and deprived him of a fair trial.

3. Whether the government improperly withheld three prior statements by the prosecution's chief witness and thereby deprived petitioner of a fair trial.

4. Whether petitioner has made the factual showing necessary to warrant an evidentiary hearing on his claim that he was subjected to illegal electronic surveillance.

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OPINIONS BELOW

The opinion of the district court (Pet. App. 1a-47a) is reported at 542 F. Supp. 973. The per curiam memorandum of the court of appeals (App., *infra,* 1a) is not reported.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 1a) was entered on February 16, 1983. A petition for rehearing was denied on March 29, 1983 (Pet. App. 48a). The petition for a writ of certiorari was filed on June 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a two-month jury trial in the United States District Court for the Southern District of New York, petitioner was convicted in 1950 on two counts of perjury, in violation of 18 U.S.C. 1621.[1] The court of appeals

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[1]An earlier trial, in 1949, ended in a mistrial.

affirmed, *United States* v. *Hiss,* 185 F.2d 822 (2d Cir. 1950), cert. denied, 340 U.S. 948 (1951), and petitioner served three years of a five-year prison sentence. Two years after his conviction petitioner moved for a new trial, claiming newly discovered evidence. His motion was denied, *United States* v. *Hiss,* 107 F. Supp. 128 (S.D.N.Y. 1952), and the court of appeals affirmed, 201 F.2d 372 (2d Cir.), cert. denied, 345 U.S. 942 (1953). Beginning in March 1975, petitioner filed a number of requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, for access to government files concerning the events leading to his conviction. Based on documents provided by the government in response to these requests, petitioner sought a writ of error coram nobis asserting various claims of prosecutorial misconduct. The district court denied the petition and declined to hold an evidentiary hearing (Pet. App. 1a-47a). The court of appeals affirmed (App., *infra,* 1a).

The facts pertaining to petitioner's conviction and his various claims of error are set out in the district court's opinion and may be summarized as follows.[2]

1. In December 1948 petitioner testified before a federal grand jury in the Southern District of New York investigating allegations of espionage. It was alleged by a former functionary of the American Communist Party, Whittaker Chambers, that petitioner had provided him with copies or summaries of documents — principally from the State Department — for ultimate delivery to the Soviet Union. Petitioner testified that neither he nor his wife ever delivered such documents to Chambers. Petitioner also

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[2]The documentation underlying petitioner's claims is contained in a lengthy joint appendix filed with the court of appeals. References to this joint appendix are generally cited as "C.A. App." Specific references to the proceedings at petitioner's first trial and his second trial are cited as "*Hiss I*" and "*Hiss II*" followed by the appropriate page citations to the joint appendix.

testified that within three months of beginning work at the State Department he had ceased all contact with Chambers. (Certain deliveries to Chambers were alleged to have occurred after this time.) These two denials formed the basis for petitioner's indictment on two counts of perjury. (Pet. App. 1a-3a, 12a.)

The principal government witness at trial was Whittaker Chambers. Chambers had been introduced to petitioner in the summer of 1934 by J. Peters, the head of the American Communist Party underground, and Harold Ware, the leader of a secret Communist organization in Washington, D.C. At the time, petitioner was counsel to the Nye Committee, a Senate committee investigating the munitions industry. It was agreed that petitioner would be detached from Ware's organization and become part of a parallel organization being formed by Chambers.

Petitioner thereafter began providing Chambers with confidential State Department documents, which Chambers would photograph and return. In September 1936 petitioner began work at the State Department, where he became an assistant to Assistant Secretary Francis Sayre. While in that position petitioner would regularly, every week to ten days, remove important State Department documents and bring them home for delivery to Chambers. Chambers would take the documents to Baltimore, photograph them, and return them to petitioner the same night, permitting petitioner to replace the documents in the State Department files the next morning.

In mid-1937 a new procedure was adopted. Petitioner began removing documents on a daily basis. They were then retyped — either verbatim or in summary form — and returned to the State Department. Approximately every ten days Chambers would pick up the retyped documents along with petitioner's handwritten notes regarding other documents he had been unable to remove from the State

Department. Chambers would then photograph the materials and turn the film over to a Colonel Bykov, a Soviet spy. This procedure continued until April of 1938, when Chambers broke with the Communist Party. (Pet. App. 15a-16a.)

Between 1939 and 1946, Chambers' concern about the threat of Communism prompted him to alert various officials about Communist infiltration of the government. In the course of these conversations Chambers stated that petitioner was a Communist. In 1946 petitioner became aware that these charges were circulating, and during the next two years he learned that their source was Chambers — then a senior editor for *Time* magazine. On August 3, 1948, Chambers appeared before the House Special Subcommittee of the Committee on Un-American Activities ("HUAC") and testified that petitioner was a member of the underground apparatus of the American Communist Party. Petitioner appeared before the committee two days later and denied any Communist affiliation, denied knowing anyone named Whittaker Chambers, and was unable to recognize a recent photograph of Chambers. In subsequent testimony petitioner admitted knowing a man — possibly Chambers — who used the name George Crosley. According to petitioner, Crosley was a free-lance writer whom he had known in 1934 and 1935. Crosley had stayed several days at petitioner's home, had sublet petitioner's apartment, and had been given the use of petitioner's car. On one occasion Crosley accompanied petitioner when petitioner drove from Washington, D.C. to New York City. At an August 17, 1948 HUAC hearing petitioner, in accordance with his request, confronted Chambers and identified him as Crosley. (Pet. App. 4a-12a.)

Following the confrontation at the HUAC hearing petitioner demanded that Chambers repeat his accusation in a non-privileged forum, so that petitioner could sue him for defamation. Chambers did so in a television appearance on *Meet the Press,* and petitioner sued him for libel in the United States District Court in Baltimore, Maryland. Until this time Chambers had never revealed petitioner's involvement in espionage and had disclaimed the existence of any documentary evidence of petitioner's Communist Party activities. During discovery proceedings in the Baltimore libel action, however, Chambers produced a set of documents ("the Baltimore documents") that directly implicated petitioner in espionage activities.[3] The Baltimore documents comprised 65 pages of typewritten copies (verbatim or summaries) of War Department and State Department documents of some consequence from early 1938. Also included in the Baltimore documents were four notes, in petitioner's handwriting, summarizing State Department documents (Pet. App. 12a-13a).[4] Chambers had retained these documents — provided to him by petitioner during the final months of their espionage relationship — and after his break with the Communist Party in April 1938 had given them to a relative for safe keeping.

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[3]Explaining his prior concealment of espionage activities, Chambers said that he had hoped to cripple Communist infiltration in the government simply by exposing its existence, without uncovering the depth of disloyalty attendant upon espionage — in Chambers' words "the ultimate perfidy." *Hiss II,* C.A. App. 3347-3348.

[4]Chambers later turned over to HUAC five rolls of film, used to photograph certain State Department documents pertaining to proposed German-American trade agreements and three cables relating to China. The cables were initialed by petitioner (Pet. App. 13a n.12). (For a time Chambers had hidden the film in a pumpkin on his Maryland farm.)

The Baltimore documents provided powerful corroboration of Chambers' allegations. Petitioner conceded that the four handwritten documents were in his handwriting and that they summarized State Department documents to which he had had access. Petitioner claimed that they were drafts that he had prepared for his supervisor and later discarded while at work, and that someone else must have stolen them from the trash and given them to Chambers. But security procedures at the State Department made such a scenario unlikely, and petitioner's superior, Assistant Secretary Sayre, testified that the handwritten Baltimore documents were markedly dissimilar from handwritten notes that petitioner had prepared for him in the normal course of his duties (Pet. App. 19a n.23).

The 65 pages of typewritten Baltimore documents were also independently and directly linked to petitioner. The typewriting characteristics of the Baltimore documents were compared with four documents (the "Hiss standards") that had concededly been typed on a Woodstock typewriter once owned by petitioner. This comparison showed that all but one of the Baltimore documents had been typed on the same typewriter as the four Hiss standards. At trial petitioner did not contest that the Baltimore documents had been prepared on his typewriter; instead he claimed that the typewriter had been given away at the end of 1937, prior to the earliest date of any of the Baltimore documents. Petitioner suggested that Chambers or a confederate had gained access to the typewriter after it was given away and had used it to prepare the Baltimore documents in a way that would incriminate petitioner. (Pet. App. 12a-14a & nn.11, 13, 14; *id.* at 18a-19a & n.21.)

Chambers' version of the events was corroborated in several other significant respects. Julian Wadleigh, another State Department official who had passed documents to

Chambers, confirmed Chambers' role in the Soviet espionage apparatus (Pet. App. 16a n.18). The evidence also showed that in late 1936 Chambers had given petitioner an oriental rug. Petitioner claimed that it was a gift to compensate him for the rent Chambers had not payed when he sublet petitioner's apartment. Chambers testified that he had given the rug to petitioner at the direction of Colonel Bykov, his Soviet contact, as a "gift from the Soviet people in recognition of the work of the American Communists" (Pet. App. 19a-20a). Wadleigh testified that he too had received an oriental rug from his Soviet contact in late 1936 (*ibid.*). Chambers also testified that in November 1937 he had borrowed $400 from petitioner in order to purchase a car. (Petitioner had testified before the grand jury that he had had no contact with Chambers after January 1937.) Chambers' recollection of the amount and date of the loan was confirmed by petitioner's bank records and the records of the car dealership (*ibid.*).

2. Two years after his conviction petitioner sought a new trial on the basis of newly discovered evidence regarding the Woodstock typewriter introduced at trial as Defense Exhibit UUU.

At trial the evidence that had definitively linked petitioner to the typed Baltimore documents was an expert comparison of the typewriting characteristics of four documents that had concededly been typed by petitioner's wife on a typewriter once owned by the Hisses. This expert opinion was initially rendered without access to the typewriter, and its accuracy was not disputed at trial (Pet. App. 12a n.11, 18a-19a & n.22). Nevertheless, the typewriter was considered a potentially significant piece of evidence, and intense efforts were made to locate it. The search for the typewriter — given away ten years earlier — entailed tracking its course through a half dozen subsequent possessors until it was located and purchased by petitioner's lawyers at

a junk shop. At trial, its ten-year chain of custody was established, petitioner and his wife identified it as their typewriter, and it was introduced in evidence as Defense Exhibit UUU (Pet. App. 39a-40a). As noted above, petitioner's defense at trial was that he had given the typewriter away before any of the Baltimore documents were prepared. Petitioner theorized that Chambers had thereafter gained access to the typewriter and used it to prepare the incriminating documents.

In his motion for a new trial petitioner presented an even more strained scenario. He argued that Chambers had fabricated a typewriter capable of reproducing the characteristics of the Hisses' typewriter, had used the fabricated typewriter to prepare the Baltimore documents, and had then placed the fabricated typewriter where it would be discovered by petitioner's attorneys and introduced in evidence. Although various defense experts touted the feasibility of such a fabrication, a year's worth of expert endeavors failed to produce a fabricated typewriter capable of generating typing characteristics not distinguishable by an expert from the typescript of the Hiss standards and the Baltimore documents. The trial court dismissed this "forgery by typewriter" argument (Pet. App. 42a) as unsupported by any proof. *United States* v. *Hiss, supra,* 107 F. Supp. at 130-134.

More pertinent to petitioner's present claims is the evidence advanced on the new trial motion concerning the origins of his typewriter. The typewriter — a Woodstock model — had first been purchased by petitioner's father-in-law, Thomas Fansler, for use in his insurance partnership. In his motion for a new trial petitioner contended that Defense Exhibit UUU, which bore the serial No. 230,099, had not been manufactured by the Woodstock company until late July or early August of 1929. But typewriter

samples from the correspondence of the insurance partnership showed that a new Woodstock typewriter had been used there as early as July 8, 1929. This proved, according to petitioner, that Woodstock typewriter No. 230,099 (Defense Exhibit UUU) was not the Woodstock typewriter later given by Fansler to the Hisses. Therefore it must have been fabricated by Chambers. The trial court found, however, that the Woodstock company documents relied upon by petitioner were too incomplete and unreliable to establish that typewriter No. 230,099 had been manufactured later than July 8, 1929. *United States* v. *Hiss, supra,* 107 F. Supp. at 133-134. Indeed, petitioner's own evidence indicated that No. 230,099 could have been manufactured as early as April 1929 (*id.* at 133).

3. Since 1975 petitioner has uncovered through the Freedom of Information Act additional historical details pertaining to his prosecution. Petitioner relies on these materials in support of his petition for a writ of error coram nobis.

a. Petitioner's first claim relates to the dispute over the authenticity of Defense Exhibit UUU — the same issue litigated in petitioner's motion for a new trial.

Through the FOIA petitioner has now gained access to the raw file of the FBI's investigation into the origins of Woodstock typewriter No. 230,099. It is undisputed that FBI document experts compared typing samples from that typewriter with the Baltimore documents and the Hiss standards, and concluded that all three sets of documents had been typed on the same machine.[5] They found, in short, that Woodstock typewriter No. 230,099 (Defense Exhibit

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[5]During the period between petitioner's first and second trials the FBI, pursuant to court order, was permitted to take samples from Defense Exhibit UUU (Pet. App. 19a n.22).

UUU) had belonged to the Hisses and had been used as an instrument of espionage. The raw data regarding the origins of the typewriter were less conclusive, since the recollection of witnesses regarding events 20 earlier was unclear. For example, the seller, Woodstock agent Thomas Grady, and the buyer, Fansler's partner Harry Martin, said the partnership had bought the Woodstock typewriter in 1927. Yet both Grady and Martin associated the purchase with a time when Ann Coyle worked for the partnership as a secretary, and Coyle was not hired until the fall of 1928 (Pet. App. 40a). Other FBI interviews raised the possibility that the Fansler-Martin partnership had bought a Woodstock typewriter in 1927 and had later traded it in for a new typewriter (C.A. App. 315-316, 325). This scenario would have been consistent with evidence — presented by petitioner in his new trial motion — that the Fansler-Martin partnership had replaced an older Woodstock typewriter with a new one in early July 1929.

b. Petitioner has also learned through FOIA requests that on two occasions a former defense investigator, Horace Schmahl, provided the government with information regarding matters that were the subject of inquiry by defense counsel.[6] On March 22, 1949 (after petitioner's indictment and before his first trial) Schmahl advised the FBI that he had been asked to investigate an allegation that Mrs. Chambers had used a false name in making a credit application. (Schmahl had discussed the same assignment with the FBI prior to the indictment, and about the time of the indictment had given the FBI a credit bureau report—a

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[6]Petitioner's suggestion of additional unauthorized contacts by Schmahl was rejected by the district court as mere speculation (Pet. App. 24a n.27).

document the FBI already had (C.A. App. 699)).[7] The second contact occurred during the first trial, when Schmahl—no longer working for the defense— advised the prosecutor that at one time the defense had contacted a typewriter firm in an effort to locate an old Woodstock typewriter. Both of these contacts by Schmahl were unsolicited. (Pet. App. 23a-25a.)

c. Petitioner has also learned through the FOIA of three statements by Whittaker Chambers that were not provided during discovery at trial. One, a March 1946 FBI report, summarized an interview in which Chambers made several assertions inconsistent with his trial testimony. Chambers stated that he broke with the Communist Party in 1937, but later testified that this occurred in April 1938. Chambers also stated that he had no documentary proof of petitioner's Communist Party affiliation, though he later produced the Baltimore documents establishing petitioner's espionage activities on behalf of the Soviet Union.

The second statement, a February 1949 handwritten note by Chambers, suggested that it would be prudent to anticipate that petitioner's defense would press the charge that Chambers was a homosexual. Evidence of Chambers' homosexuality, according to petitioner, would have bolstered the defense theory that Chambers was a "psychopathic personality" — a mental disorder whose pathology included persistent lying, acts of deception, drug addiction, alchoholism, and sexual abnormality (Pet. 26).

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[7]Schmahl had numerous contacts with the FBI prior to the indictment. These contacts were authorized and encouraged by petitioner's attorneys, who were endeavoring to cooperate completely with the government in the hope of avoiding indictment (Pet. App. 14a, 24a & n.28).

The third statement dates from mid-April of 1949. During the preceding three and a half months FBI agents had conducted numerous interviews of Chambers and had collated their results into a 184-page first-person narrative.[8] From this lengthy recital petitioner has extracted one inconsistent statement: Chambers said that his car loan from petitioner was $500, rather than $400 as he testified at trial.

ARGUMENT

1. Petitioner first contends (Pet. 11-16) that the government improperly withheld evidence that Defense Exhibit UUU — which both petitioner and his wife testified was their typewriter (Pet. App. 40a) — was not the machine purchased by the Fansler-Martin partnership. This prosecutorial misconduct, petitioner claims, prevented him from receiving a fair trial. This claim is frivolous.

In the first place, as the court of appeals noted (Pet. App. 41a n.51), "[i]t would seem axiomatic that * * * if a defendant puts a typewriter in evidence and he and his wife state under oath that that was their typewriter, the prosecutor is entitled to accept this as so." This is particularly true when the government's document experts (as well as the defendant's; see Pet. App. 12a n.11) concluded that that very machine had been used to type not only the Baltimore documents, but also the Hiss standards. It can hardly be considered improper for the government under those circumstances to have ignored conflicting hearsay statements

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[8]Chambers may have reviewed the narrative but never signed it — apparently because doing so could have markedly altered its discoverability under then existing law (Pet. App. 30a).

based on recollections two decades old about when the typewriter was purchased by its prior owner.[9]

More important, the history of Woodstock typewriter No. 230,099 up to the time the Hisses owned it in the early 1930's had no bearing on either the government's or the defendant's theory of the case. For the government's part, unchallenged expert testimony at trial established that the same typewriter used by Mrs. Hiss in the early thirties had been used to type the Baltimore documents in early 1938. And petitioner claimed only that that same typewriter had passed out of his possession in late 1937, prior to the creation of the Baltimore documents. Petitioner did not advance at trial the implausible theory — first proposed in his motion for a new trial — that Chambers had somehow fabricated a typewriter identical to the one he had owned, had used it to type the Baltimore documents, and had then planted it so that it would be discovered by investigators for the defendant.[10] Thus, how the Hisses came to possess

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[9]After 30 years of hindsight the weight of the evidence continues to support the proposition that Woodstock typewriter No. 230,099 was the machine that passed from the Fansler-Martin partnership to the Hisses in the early 1930's. Expert testimony presented by petitioner on his new trial motion established that a Woodstock typewriter at the Fansler-Martin partnership had been replaced with a new Woodstock typewriter in early July 1929 — a date within the approximate time frame for the manufacture of Woodstock typewriter No. 230,099. *United States* v. *Hiss, supra,* 107 F. Supp. 133-134. This evidence is consistent with information in the FBI reports indicating that the partnership purchased a Woodstock typewriter which was later traded in (Pet. App. 40a). Furthermore, petitioner has failed to provide an alternative scenario — sinister or otherwise — that would explain how he found Woodstock typewriter No. 230,099 at the end of a chain of custody beginning in his home (Pet. App. 39a-40a). Finally, as we have noted, samples taken from Defense Exhibit UUU established that it was used to type both the Hiss standards and the Baltimore documents.

[10]Indeed, petitioner even now does not reiterate the "forgery by typewriter" theory, but contents himself with the argument that the undisclosed information would have presented "endless opportunities

Woodstock typewriter No. 230,099 was, quite simply, irrelevant (Pet. App. 41a).[11] See *United States* v. *Agurs*, 427 U.S. 97, 112 (1976) (undisclosed evidence must create a reasonable doubt that did not otherwise exist).

In any event it appears that petitioner already *had* much of the information he claims only recently came to light from the government's files.[12] Petitioner conceded in the court of appeals that defense files contained information regarding the manufacturing dates of Woodstock typewriters (Br. for Petitioner-Appellant 24 n.27). And he was also aware of Martin's belief that the Fansler-Martin typewriter had been bought in 1928 (C.A. App. 291). It is clear that petitioner, whose investigators succeeded in tracing the

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for cross-examination of the government" (Pet. 15). That claim is difficult to take seriously, given that petitioner conceded long before trial that the same typewriter had typed both the standards and the Baltimore documents (Pet. App. 41a), that petitioner and his wife both testified that typewriter No. 230,099 was theirs, and that petitioner's experts agreed with the government's that Exhibit UUU had typed both sets of documents.

[11]Petitioner endeavors (Pet. 11, 15) to establish the government's reliance on Defense Exhibit UUU by pointing to two government witnesses who testified regarding the typewriter. These witnesses, however, were not called to vouch for Defense Exhibit UUU — the Hisses had already done that. Both witnesses were called in rebuttal to counter specific assertions made in the defense case. FBI Agent John McCool demonstrated that the typewriter was in working condition — thus undercutting Mrs. Hiss's testimony that it had been given away because it was "pretty much of a wreck." *Hiss II*, C.A. App. 4403; see *Hiss II*, C.A. App. 4574 (prosecution summation). George Roulhac testified that he first saw the typewriter at the Catletts' in mid-April 1938 — thus undercutting the defense's assertion that the typewriter had been given to the Catletts in late 1937. *Hiss II*, C.A. App. 4494; see *Hiss II*, C.A. App. 4573 (prosecution summation).

[12]This conclusion is supported by Professor Weinstein's review of the defense files, which disclosed that at the time of trial the defense already had most of the Martin-Grady information from its own investigations. A. Weinstein, *Perjury: The Hiss-Chambers Case* 561 (1978).

Hisses' typewriter, had the resources to pursue this information had it been relevant to his defense. That he chose not to do so is no basis for now complaining that similar information was not disclosed by the government. See *United States* v. *LeRoy*, 687 F.2d 610, 619 (2d Cir. 1982), cert. denied, No. 82-5571 (Jan. 24, 1983); *United States* v. *Brown*, 628 F.2d 471, 473 (5th Cir. 1980).[13]

Finally, petitioner has already made an unsuccessful motion for a new trial based on "virtually the same evidence" he now relies on (Pet. App. 41a). And the district court, in denying that motion, stated:

> The defense reasoning that No. 230,099 was manufactured after the Hiss machine is not sustained by any proof. Their theory is based wholly upon incomplete records from which they have drawn speculations from approximate dates of manufacture. Some of their own witnesses cannot support their theory.

United States v. *Hiss, supra*, 107 F. Supp. at 134.

2. Petitioner also contends (Pet. 16-20) that the government's receipt of information from a former defense investigator abridged his Sixth Amendment right to counsel and deprived him of a fair trial. This claim is without merit.

The government did not instigate either of the contacts by Schmahl that are the subject of petitioner's present complaint. Nor did the government derive any tangible benefit

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[13]It is also worth emphasizing that this Court did not hold until a quarter century after petitioner's conviction that a prosecutor is constitutionally required to disclose exculpatory evidence despite the fact that the defendant made no request for it. *United States* v. *Agurs, supra*, 427 U.S. at 106-107. Petitioner made no request for government information regarding the origins of Defense Exhibit UUU.

from the information he provided (Pet. App. 25a).[14] It is well settled that there can be no violation of the Sixth Amendment right to counsel unless there is a realistic possibility of injury to the defendant or benefit to the prosecution. *Weatherford* v. *Bursey*, 429 U.S. 545, 558 (1977). Some adverse consequence to the representation received by the defendant or the fairness of the trial proceedings must be shown. *United States* v. *Morrison*, 449 U.S. 361, 363-364 (1981).

Petitioner has failed to make even a semblance of such a showing. Not only was the information Schmahl supplied of little use, but his contacts both occurred in connection with petitioner's first trial. Even if it were assumed that Schmahl's actions had caused palpable prejudice at that trial, the remedy sanctioned by this Court would have been a new trial. See *Hoffa* v. *United States*, 385 U.S. 293, 307 (1966); *Caldwell* v. *United States*, 205 F.2d 879, 881 (D.C. Cir. 1953), cert. denied, 349 U.S. 930 (1955); *Coplon* v. *United States*, 191 F.2d 749, 759 (D.C. Cir. 1951), cert. denied, 342 U.S. 926 (1952). Petitioner in fact had a second trial (see note 1, *supra*), and as of that proceeding the value of Schmahl's information had been reduced to a nullity. Under such circumstances there is no basis for petitioner's claim that he was denied a fair trial.[15] *United States* v.

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[14]At his first trial petitioner himself disclosed the rental of a Woodstock typewriter — the information provided by Schmahl — as soon as the subject came up. *Hiss I*, C.A. App. 2767-2768. The question of Mrs. Chambers' credit application, also aired at the first trial (*id.* at 2385-2387), was not only insignificant, but as we noted above (page 10), the substance of that information had been communicated to the FBI before the indictment.

[15]Petitioner also complains (Pet. 18-19) that the FBI interviewed two document experts retained by defense counsel in connection with his motion for a new trial. These post-trial contacts had no impact on the fairness of the earlier trial proceedings. Moreover, a defendant can have no legitimate expectation that an expert, like other witnesses, will not also be contacted and interviewed by the government. *United States* v. *Andreadis*, 234 F. Supp. 341, 345 (E.D.N.Y. 1964).

Morrison, supra, 449 U.S. at 366. Cf. *Smith* v. *Phillips,* 455 U.S. 209, 219 (1982).

Aware of his inability to show any prejudice, petitioner seeks (Pet. 19) to invoke a per se rule of reversal for any governmental incursion into the defense camp that results in the transfer of some information to the government. *United States* v. *Levy,* 577 F.2d 200 (3d Cir. 1978).[16] But in *Morrison* this Court disapproved the Third Circuit's application of this per se rule, and made clear that an extreme remedy for any Sixth Amendment violation must be predicated upon some adverse impact on the fairness of the defendant's trial. *United States* v. *Morrison, supra,* 449 U.S. at 367. The lack of any discernable impact with regard to the fairness of petitioner's second trial precludes any deviation in petitioner's case from the holding in *Morrison.*[17]

3. Petitioner finally contends (Pet. 20-27) that the government's failure to produce three prior statements by Whittaker Chambers deprived him of a fair trial. There is no merit to this claim.

As the district court correctly found (Pet. App. 26a n.32, 29a), petitioner's various requests for prior statements by Chambers were limited to any such statements made prior to August 3, 1948 — the date of Chambers's first public appearance before HUAC. The choice of this cutoff date

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[16]In *Levy* the communication to the government involved actual defense strategy.

[17]Some cases prior to *Morrison* had applied a per se rule to particularly egregious governmental intrusions — misconduct that was "manifestly and avowedly corrupt," *United States* v. *Gartner,* 518 F.2d 633, 637 (2d Cir.), cert. denied, 423 U.S. 915 (1975); or "ruthless beyond justification," *United States* v. *Rosner,* 485 F.2d 1213, 1227 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974). Even if the rule of those cases survives *Morrison,* the government's receipt of unsolicited and innocuous information on two occasions from someone not working with the prosecution hardly meets those criteria.

was understandable. Petitioner already had Chambers' extensive HUAC testimony from the summer of 1948, his testimony in the Baltimore libel action, and his grand jury testimony. The decision to seek out inconsistencies through access to statements made before these formal appearances was not capricious (Pet. App. 29a).

Only one of the three statements now at issue was made before August 3, 1948—a March, 1946 FBI report by one agent summarizing another agent's interview of Chambers. There is no evidence that the report was signed or adopted—or even seen—by Chambers, and its discoverability is thus far from apparent.[18] Petitioner suggests (Pet. 23) that a reason for its production may be found in cases foreshadowing *Brady* v. *Maryland*, 373 U.S. 83 (1963). But as this Court made clear in *United States* v. *Agurs, supra*, 427 U.S. at 112, there must be a reasonable likelihood that undisclosed evidence could have affected the outcome of the trial before a conviction will be overturned under *Brady*.[19] And the only useful item of information petitioner can point to in the 1946 FBI report (Chambers' disclaimer

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[18]Petitioner's trial long antedated both this Court's decision in *Jencks* v. *United States*, 353 U.S. 657 (1957), and the Jencks Act, 18 U.S.C. 3500. As noted by the district court (Pet. App. 28a), at the time of petitioner's trial a defendant seeking production of witness statements was first required to establish that the witness had given a signed statement and that the statement contradicted his trial testimony. The statement would then be subject to in camera review to determine the extent to which it should be disclosed. Not only was the 1946 FBI report unsigned (and so not producible under then applicable law), but it is doubtful that the report would be discoverable as Jencks Act material even today. *Goldberg* v. *United States*, 425 U.S. 94, 110 n.19 (1976); *United States* v. *Traylor*, 656 F.2d 1326, 1336 (9th Cir. 1981).

[19]Petitioner is clearly incorrect in arguing (Pet. 24) that a verdict may be overturned whenever undisclosed evidence *might* have affected the outcome of the trial. *United States* v. *Agurs, supra*, 427 U.S. at 108-109. See also *United States* v. *Valenzuela-Bernal*, No. 81-450 (July 2, 1982), slip op. 7-14.

that he had any documentary evidence to show that petitioner was a Communist[20]) was similar to other early statements made by Chambers. These alternative sources were fully utilized by petitioner's counsel in cross-examining Chambers. *Hiss II,* C.A. App. 3388-3400, 3414-3415. No prejudice can arise from the government's failure to disclose cumulative impeachment evidence. *United States* v. *Myers,* 692 F.2d 823, 846-847 (2d Cir. 1982), cert. denied, No. 82-1183 (May 31, 1983); *Ostrer* v. *United States,* 577 F.2d 782, 787 (2d Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

Chambers' two statements from 1949, unlike the 1946 statement, were made after the 1948 cutoff fixed by petitioner's discovery request. Thus any prejudice that may arise from their unavailability at trial must be measured against the stricter level of materiality laid down in *Agurs*: the undisclosed evidence must create a reasonable doubt that did not otherwise exist. *United States* v. *Agurs, supra,* 427 U.S. at 112. No such doubt arises from the 1949 statements.

The only impeachment material in the February 1949 handwritten statement concerned Chambers's homosexuality. Even if one makes the unlikely assumption that homosexuality would be a proper basis for cross-examination,[21] petitioner was fully armed with his own evidence of

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[20]Petitioner asserts that in his 1946 statement Chambers "went out of his way to clear Hiss" (Pet. 26). As demonstrated by the district court (Pet. App. 33a n.39), this claim is clearly false.

[21]As the district court noted (Pet. App. 36a), it is most unlikely that evidence of homosexuality could have been used to attack Chambers' character directly. See *United States* v. *Nuccio,* 373 F.2d 168, 171 (2d Cir.), cert. denied, 387 U.S. 906 (1967); *United States* v. *Provoo,* 215 F.2d 531, 536-537 (2d Cir. 1954). Nor would the relevance of such evidence be materially enhanced by its presentation in conjunction with an attack on Chambers as a "psychopathic personality" (Pet. 26). See Pet. App. 36a n.44.

Chambers' homosexuality and chose not to pursue the issue at trial (Pet. App. 34a nn.40, 42).[22] He cannot complain that the same information was not also given to him from government files. *United States* v. *LeRoy, supra,* 687 F.2d at 619; *United States* v. *Brown, supra,* 628 F.2d at 473.

Nor does petitioner have any complaint based upon the single inconsistency he has gleaned from Chambers' 184-page April, 1949 statement. Chambers' statement that petitioner had loaned him $500, rather than $400, to buy a car is an inconsistency aptly characterized by the district court as "minor in the extreme" (Pet. App. 30a). The $400 amount was corroborated at trial, and petitioner cannot seriously contend that an earlier discrepency of $100 in Chambers' recollection would have created a reasonable doubt that did not otherwise exist. *United States* v. *Agurs, supra,* 427 U.S. at 112.

4. Petitioner also claims (Pet. 28-29) that he is entitled to an evidentiary hearing because he was subjected to improper electronic surveillance, the records of which have allegedly been destroyed.[23] But petitioner's counsel specifically

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[22]Petitioner's decision not to pursue the issue of Chambers' homosexuality has been attributed to his concern that raising the issue might have led to speculation of a homosexual relationship between Chambers and petitioner's stepson, who had been discharged from the Navy due to a homosexual relationship (Pet. App. 34a-35a n.42). See Marbury, *The Hiss-Chambers Suit,* 41 Md. L. Rev. 75, 91-92 (1981); Weinstein, *supra* note 12, at 270, 377-380, 382-384, 395, 582-584.

Petitioner asserts (Pet. 26) that the prosecutor's cross-examination of Drs. Binger and Murray was disingenuous in stating (Pet. App. 37a) that there was "no evidence * * * of * * * sexual abnormality" with respect to Chambers. The district court found this assertion improper, but harmless (Pet. App. 37a). We note, however, that it accurately stated the evidence petitioner offered at trial.

[23]See *United States* v. *Coplon,* 185 F.2d 629, 637 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1953) (some wiretap records in the New York office of the FBI were destroyed during this period).

conceded in the district court that he had no evidence of such wiretapping. C.A. App. 4617, 4658.[24] The district court found this concession dispositive of petitioner's electronic surveillance claim (Pet. App. 4a n.1). Petitioner cannot persist in this claim armed with no more than the bare hope of what he might find through future discovery.[25]. Cf. *Contemporary Mission, Inc.* v. *United States Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981). We note, in any event, that even if such wiretapping occurred petitioner would face substantial difficulty in establishing its illegality[26] and its

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[24]The FBI conducted electronic surveillance of petitioner at his Washington, D.C. residence from December 1945 to September 1947, when he moved to New York. This wiretap was authorized by the Attorney General in order to investigate alleged espionage activities. Petitioner's present complaint alleges that this electronic surveillance continued after he moved to New York. We are informed that all known records of electronic surveillance of petitioner have been released to him.

[25]Petitioner's FOIA litigation seeking further data regarding the New York files of the FBI is pending before the same district judge who dismissed his petition for a writ of error coram nobis. *Hiss* v. *Department of Justice*, 76 Civ. 4672 (S.D.N.Y.) (Owen, J.).

[26]Warrantless electronic surveillance authorized by the Attorney General for the purpose of investigating espionage activities has been held lawful. *United States* v. *Buck*, 548 F.2d 871, 875-876 (9th Cir.), cert. denied, 434 U.S. 890 (1977); *United States* v. *Butenko*, 494 F.2d 593, 605 (3d Cir.) (en banc), cert. denied, 419 U.S. 881 (1974); *United States* v. *Brown*, 484 F.2d 418 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974). See also *Katz* v. *United States*, 389 U.S. 347, 363-364 (1967) (White, J., concurring). Given petitioner's position in the State Department and Chambers' identification of him as a devoted Communist sympathizer, the institution of warrantless electronic surveillance of petitioner would likely have met the criterion of reasonableness. *United States* v. *Truong Dinh Hung*, 629 F.2d 908, 916 (4th Cir. 1980), cert. denied, 454 U.S. 1144 (1982); *Halperin* v. *Kissinger*, 606 F.2d 1192, 1204-1206 (D.C. Cir. 1979), aff'd by an equally divided court, 452 U.S. 713 (1981).

effect on trial proceedings concerning events ten years earlier. *Alderman* v. *United States,* 394 U.S. 165, 183 (1969) (the defendant bears the burden of proving that a substantial portion of the case against him was tainted). Moreover, since petitioner's wiretapping casts no doubt on the accuracy of the jury's verdict, it provides no basis for collateral relief from his conviction, especially in a coram nobis proceeding thirty years after final judgment. The district court plainly did not abuse its discretion in declining to permit petitioner to pursue this tenuous claim. *United States* v. *Balistrieri,* 606 F.2d 216, 221 (7th Cir. 1979), cert. denied, 446 U.S. 917 (1980).

5. In any application for coram nobis relief it is presumed that the earlier trial proceedings were correct, and the burden rests on the accused to show otherwise. *United States* v. *Morgan,* 346 U.S. 502, 512 (1954); cf. *Johnson* v. *Zerbst,* 304 U.S. 458, 468 (1938). This burden is particularly heavy where, as here, the "virtual impossibility" of retrial (Pet. App. 23a) would transform the issuance of a writ of error coram nobis into "the practical equivalent of an acquittal." *United States* v. *Keogh,* 440 F.2d 737, 741 (2d Cir.), cert. denied, 404 U.S. 941 (1971). Moreover, as a means of collaterally attacking a conviction, coram nobis relief is available only to correct errors " 'of the most fundamental character, that is, such as rendered the [earlier] proceeding itself irregular and invalid.' " *United States* v. *Addonizio,* 442 U.S. 178, 186 (1979), quoting *United States* v. *Mayer,* 235 U.S. 55, 69 (1914). None of petitioner's factual allegations approaches such a level of fundamental unfairness. Even judged by the less stringent standards applicable on direct review — the materiality requirements articulated in *Agurs* — none of petitioner's claims would entitle him to relief. The district court found that the new information regarding the Woodstock typewriter was "wholly peripheral" and "irrelevant" (Pet. App. 41a); that

information provided by Schmahl to the government could not have had the "slightest impact" on petitioner's conviction at his second trial (*id.* at 25a); and that failure to produce three of Chambers' numerous prior statements could not have prejudiced petitioner (*id.* at 26a-38a). Because the record before the district court conclusively demonstrated that petitioner was not entitled to any relief on the basis of these claims, the court was not required to hold an evidentiary hearing. *United States* v. *Tribote*, 297 F.2d 598, 600 (2d Cir. 1961); see *Machibroda* v. *United States*, 368 U.S. 487, 495 (1962). Petitioner has simply failed to raise any issue of "material fact on a claim of constitutional dimensions." *United States* v. *Carlino*, 400 F.2d 56, 58 (2d Cir. 1968), cert. denied, 394 U.S. 1013 (1969).

Finally, we cannot overlook petitioner's failure to contest (Pet. 29) the substantial trial evidence establishing his guilt. Petitioner would have this Court isolate that issue from any consideration of the fairness of his trial. While such a course may be appropriate in the case of clearly outrageous government conduct, see *Rochin* v. *California*, 342 U.S. 165 (1952), the facts relied on by petitioner do not amount to even an allegation of such activity here. Petitioner's claims must thus succeed or fail in relation to their effect on "the justice of the finding of guilt." *United States* v. *Agurs*, *supra*, 427 U.S. at 112. The district court, after a thorough inquiry, found that none of petitioner's claims "placed [the] verdict under any cloud" (Pet. App. 47a). Petitioner is not entitled to a standard of review that ignores his inability to show that the jury's verdict of guilty would have been in any way affected. *Smith* v. *Phillips*, *supra*, 455 U.S. at 219-220; *United States* v. *Agurs*, *supra*, 427 U.S. at 111-113.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1983

DOJ-1983-09

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of February, One Thousand Nine Hurdred and Eighty-three.

PRESENT:

HON. WILLIAM H. TIMBERS,
HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. THOMAS J. MESKILL,
Circuit Judges.

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ALGER HISS,

Plaintiff-Appellant,

v. *ORDER*
82-6196

UNITED STATES OF AMERICA,

Defendant-Appellee.

..... x

Alger Hiss appeals from a judgment of the United States District for the Southern District of New York (Richard Owen, J.) dismissing his petition for a writ of error *coram nobis* for relief from a conviction of perjury, alleging several claims of prosecutorial misconduct. 28 U.S.C. § 1651(a) (1976).

We find the appeal to be completely without merit and affirm the judgment below substantially for the reasons stated in the thorough opinion of Judge Owen reported at 542 F. Supp. 973 (S.D.N.Y. 1982).

Hon. William H. Timbers

Hon. Ellsworth A. Van Graafeiland

Hon. Thomas J. Meskill

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